

Statutory changes to enforceable policy: Wetlands Mitigation- Compensation Policy and Supplemental Guidelines

Virginia Administrative Code Regulation 4VAC20-390-10 et seq.

Regulatory Change	Status of Regulation	Content of Section	Significance of Change
4VAC20-390-10. Definitions.	Adopted after approval of original CMP.	<ul style="list-style-type: none"> Defines “Compensation” as “actions taken which have the effect of substituting some form of wetland resource for those lost or significantly disturbed due to a permitted development activity; generally habitat creation or restoration. Compensation is a form of mitigation.” Defines “Mitigation” as all “actions, both taken and not taken, which eliminate or materially reduce the adverse effects of a proposed activity on the living and nonliving components of a wetland system or their ability to interact.” 	<ul style="list-style-type: none"> Not a substantial change. The development of the Wetlands Mitigation-Compensation Policy and Supplemental Guidelines is premised upon the mandate originally stated in §62.1-13.1 of the Code of Virginia and currently in §28.2-1301 which declares that the public policy of the Commonwealth is “to preserve wetlands and to prevent their despoliation and destruction and to accommodate necessary economic development in a manner consistent with wetlands preservation.”
4VAC20-390-20. Policy.	Adopted after approval of original CMP.	<ul style="list-style-type: none"> The Virginia Marine Resources Commission intends to encourage, where appropriate, the compensation of all permitted tidal wetland losses, especially vegetated losses, provided that all mitigative measures have been considered to avoid any impact. Compensation includes compensation on-site; compensation within the watershed; compensation through the use of a mitigation bank as authorized by §28.2-1308; or acceptance of an applicant’s offer of payment to an in-lieu fee account dedicated to wetland creation and restoration. 	<ul style="list-style-type: none"> Not a substantial change. <i>See above.</i>
4VAC20-390-30. General criteria.	The “Wetlands Guidelines” were approved as part of the original CMP, and remain in effect.	<ul style="list-style-type: none"> Declared that it shall remain the policy of the Commonwealth to mitigate or minimize the loss of wetlands and the adverse ecological effects of all permitted activities through the implementation of the principles set forth in the existing Wetlands 	<ul style="list-style-type: none"> Not a substantial change. <i>See above.</i> The Policy is intended to implement the approved CMP as reflected in the Wetlands Act and the Wetlands Guidelines, both already approved parts

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		<p>Guidelines, which were promulgated by the Commission.</p> <ul style="list-style-type: none"> • To determine whether compensation is warranted and permissible, there is first an evaluation of necessity for the proposed wetlands loss, and then if the proposal passes the evaluation, compensation will be required and implemented as set forth in these Guidelines. The determination is based on the Virginia Wetlands Act which clearly indicates the General Assembly's intentions to preserve the Commonwealth's wetland resources in their "natural state" • Stated that in §28.2-1308, part of the approved CMP, the General Assembly mandated the preservation of the ecological systems within wetlands of primary ecological significance and then stipulated that development in Tidewater, Virginia shall be concentrated in wetlands of lesser ecological significance, in vegetated wetlands which have been irreversibly disturbed before July 1, 1972, in nonvegetated wetlands which have been irreversibly disturbed prior to January 1, 1983, and in areas of Tidewater, Virginia, outside of wetlands. • Declared that since use and development of tidal wetlands are regulated through the Wetlands Zoning Ordinance, commitments to preserve other existing tidal wetlands are not ordinarily an acceptable form of compensation. 	<p>of the CMP.</p> <ul style="list-style-type: none"> • Based on former Va. Code §62.1-13.3, now codified at Va. Code §28.2-1308. • Based on former Va. Code §62.1-13.3, now codified at Va. Code §28.2-1308. • Based on former Va. Code §62.1-13.5, now codified at Va. Code §28.2-1302.
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4VAC20-390-40. Specific criteria.	Adopted after approval of original CMP.	<ul style="list-style-type: none"> • Authorization of a proposal to destroy wetlands and to compensate for the loss must meet three criteria: the proposal must incorporate all reasonable mitigative actions, including alternate siting, which would eliminate or minimize wetlands loss or disturbance. The proposal must clearly be water-dependent in nature. The proposal must demonstrate clearly its need to be in the wetlands and overwhelming public and private benefits. 	Not a substantial change. <i>See above.</i> In addition to the statutory standards referenced above, the Wetlands Guidelines, approved as part of the original CMP also provided that a clear demonstration of water dependency is a requirement.
4VAC20-390-50. Supplemental guidelines.	Adopted after approval of original CMP. .	<ul style="list-style-type: none"> • The sequence of acceptable compensatory mitigation options is as follows: <ul style="list-style-type: none"> • On-site • Off-site within the same watershed or mitigation bank in the watershed; or • Through a proffered payment of an in-lieu fee if on-site and off-site compensation are shown by the applicant to be impractical considering the project location. <p>Locating a compensation site outside the river basin of the project is not acceptable unless it is done as part of a state-coordinated program of ecological enhancement.</p> <ul style="list-style-type: none"> • The Commission or wetlands board may wish to condition any approval on the receipt of an acceptable compensation plan before issuance of the final permit for an approved project. The following are required: <ul style="list-style-type: none"> • A detailed plan • An inspection by a competent authority of the planting site upon completion of grading • Accomplishment of the compensation plan and its 	<ul style="list-style-type: none"> • Not a substantial change. <i>See above.</i> These policy provisions reflect the Commission's practical experience with compensatory mitigation under the approved CMP, and are consistent with federal guidelines for wetlands compensation under Section 404 of the federal Clean Water Act. • Permit requirements and conditions such as bonding, plans for mitigation, and making public and private benefit determinations are in former Va. Code §62.1-13.5 (the Wetlands Zoning Ordinance), now codified at Va. Code §28.2-1302, part of the approved CMP. This policy document amplifies these in

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		<p>implementation by experienced professionals</p> <ul style="list-style-type: none">• A performance bond or letter of credit, which shall remain in force until the new wetland is successfully established.• Design of the compensation marsh to replace as nearly as possible the functional values of the lost resource on an equal or greater basis.• The accomplishment of compensation prior to or concurrently with the construction of the proposed project. Before any activity under the permit may begin, the permittee should own all interests in the mitigation site needed to carry out the mitigation.• The taking of all reasonable steps to avoid or minimize any adverse environmental effects associated with the compensation activities themselves.• In selecting a compensation site, no aquatic community should not be sacrificed to “create” another.• The type of plant community proposed as compensation should have a demonstrated history of successful establishment in order to be acceptable.• Manipulating the plant species composition of an existing marsh community, as a form of compensation, is unacceptable.• Nonvegetated wetlands should be treated on an equal basis with vegetated wetlands with regard to compensation and mitigation, unless site-specific information indicates one is more valuable than the other.	<p>the context of compensation requirements, but does not create new legal authority.</p>
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		<ul style="list-style-type: none">• Both short-term and long-term monitoring of compensation sites should be considered on a case-by-case basis.• Conservation or other easements to be held in perpetuity should be required for the compensation marsh.• Describes the use of Mitigation Banks, declaring that, pursuant to §28.2-1308, when any activity involving the loss of tidal wetlands authorized by the Commission or a wetlands board is conditioned upon compensatory mitigation, the applicant may be permitted to satisfy all or part of such mitigation requirements by the purchase or use of credits from any approved wetlands mitigation bank.• Declares that the use of in-lieu fees should be the last form of mitigation used to offset permitted wetland losses and must be the result of an agreed upon permit condition between the applicant and the Commission or local wetlands board provided the applicant can demonstrate that on-site or off-site compensation options are not practical and no compensatory mitigation banks have been established in the project watershed. Localities are encouraged to establish a fund for such payments dedicated to tidal wetlands restoration and creation and to combine any in-lieu fee with other potential or available funds for wetland restoration or creation projects. Payments must not be less than the cost of necessary compensation acreage	
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		or the purchase of credits from an approved bank.	
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